No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER W. GRAMER, Claimant of 213 Bottles, etc.,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington Northern Division.

Honorable John C. Bowen, Judge.

REPLY BRIEF OF APPELLANT.

J. CHARLES DENNIS,
United States Attorney,

VAUGHN E. EVANS,
Assistant United States Attorney,
Attorneys for Appellant.
Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington.

ARTHUR A. DICKERMAN,
Attorney,
U. S. Food and Drug Administration,
Federal Security Agency,
1401 South Hope Street, Room 514,
Los Angeles 15, California,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER W. GRAMER, Claimant of 213 Bottles, etc.,

Appellee.

REPLY BRIEF OF APPELLANT.

I.

Judicial Standing of Coffey Case.

Appellee asserts there is not "a single federal case which has retreated in any way from the holding of the *Coffey* case where the necessary elements for its application have been present." [Appellee's Br. 11-12.]

The authorities discussed in our main brief demonstrate the inaccuracy of this statement. Some courts have simply acquiesced in the rule of the *Coffey* case. Some courts have indicated a reluctant acquiescence. Some courts have applied the rule tersely without comment. A number of courts have given thoughtful consideration to the case and have gone to great lengths to distinguish it.

United States v. One Dodge Sedan et al., 113 F. 2d 552 (C. A. 3, 1940), presents perhaps the most stimulating and scathing appraisal given to the *Coffey* holding by any federal court. On page 552, the Court said:

> "The learned district court rendered its judgment with obvious reluctance. That reluctance appears both in its opinion and in the colloquies. It felt itself bound by the decision of the United States Supreme Court in the case of Coffey v. United States, 116 U. S. 436 . . . That case has received a distinctly 'unfavorable press.' [Citing authorities in footnote.] It has also suffered by implication, at least, in later decisions of the same tribunal. [Citing cases in footnote.] These cases certainly limit its holding to the particular facts. One has indeed the impression that only the shibboleth of *'stare decisis'* has saved it from express repudiation.
>
> "We think that the particular facts of the principal case give us the necessary loophole and in so thinking we must disagree with the learned district judge."

Here then is a rule of law that is so distasteful as to inspire the courts to seek a loophole to get around it. After discussing the doctrines of former jeopardy and *res judicata* and the functions they serve in the law, the Court continued on page 554:

> "The application of these general ideas to the case of a criminal prosecution followed by a civil suit has not been easy. Its difficulty has been enhanced by considerable confusion in the authorities. There has

been a tendency to vacillate between jeopardy and judicata, between the character of the charge and the character of the proof. Some cases emphasize the remedial nature of the second action. [Citing Murphy v. U. S., 272 U. S. 630, and Helvering v. Mitchell, 303 U. S. 391.] Others stress the difference in the degree of proof required. [Citing Stone v. U. S., 167 U. S. 178; U. S. v. Schneider, 35 F. 107; U. S. v. Donaldson-Shultz Co., 148 F. 581.] It is not our place to resolve these doubts and difficulties.

"As we have said, the Coffey case has not been expressly overruled. It is nevertheless left in a tenuous position. A prior conviction has been held not to bar forfeiture, Various Articles of Personal Property v. U. S., 282 U. S. 577. So also the *res judicata* theory of it and earlier cases seems to have been disapproved. Stone v. U. S., 167 U. S. 178; Murphy v. U. S., 272 U. S. 630; Helvering v. Mitchell, 303 U. S. 391. Whether or not that disapproval has gone far enough to be followed by the 'inferior courts' is not necessary to presently decide."

Having expressed its views on the *Coffey* case, the Court then pounced on the "loophole" which enabled it to distinguish the *Coffey* case—namely, that the claimant in the *Dodge Sedan* case was not the same person who had been previously acquitted, but the wife of that person.

We submit that the tendency of the Courts *is* to "retreat" from the *Coffey* case wherever possible.

II.

Distinction Between Instant Case and Coffey Case.

Appellee's argument is that the present case is on all fours with the *Coffey* case and that the *Coffey* case is decisive here.

In our main brief, however, we pointed out a significant distinction between the two cases. [Br. 38-41.] The *Coffey* case was an *in rem* proceeding with the objective of forfeiting certain property to the Government. The present case is an *in rem* proceeding under the Federal Food, Drug, and Cosmetic Act with the objective of condemning an allegedly violative drug; *but section 304(d) of the Act [21 U. S. C. 334(d)] expressly permits the owner of a condemned article to be given an opportunity to salvage it if it can be brought into compliance with the Act.* Thus it is clear that the statute in the *Coffey* case involved the unequivocal deprivation of property, while the statute in the present case permits a complete salvaging of the property by the owner upon reasonable terms. To put it another way, the *Coffey* case inflicts a penalty, while the statute here involved is designed primarily to bar consumer deception or injury.

By a misleading discussion of *United States v. Kent Food Corp.,* 168 F. 2d 632 (C. A. 2, 1948), cert. denied 335 U. S. 885, Appellee attempts to prove that the seizure provisions of the Federal Food, Drug, and Cosmetic Act are penalizing in nature. [Appellee's Br. 43-44.] The *Kent* case involved the seizure of catsup that was adulterated by reason of a high mold count. Concededly, the adulteration could not be cured. Claimants consented to a decree of condemnation but requested the Court to

permit export of the catsup to a foreign country, and the District Court so ordered on the theory that 21 U. S. C. 381(d)[1] would immunize the product from the adulteration provisions of the Act. But the Court of Appeals reversed on the ground that 21 U. S. C. 381(d) gives an exemption from the adulteration provisions of the Act *only to those products which are bona fide marketed for export in the first place.* The trial court had found "that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market." [Page 633.] The appellate court concluded that the vendor of an adulterated product could have only one bite at the apple; if he attempted to palm off such a product in the domestic market and was apprehended in the attempt, the salvaging provisions of 21 U. S. C. 334(d) would not authorize him thereafter to export the product pursuant to the exemption in 21 U. S. C. 381(d). In the *Kent* case, the essential point is that the product could not be brought into compliance with the adulteration provisions of the Act. Under such circumstances, salvaging was not possible.

---

[1]21 U. S. C. 381(d) provides:

"A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter."

III.

The Stipulation.

Appellee's brief [pages 19-22] gives an entirely unwarranted interpretation of the Stipulation entered into in this case. *The Government did not stipulate* that "the issue determined in the criminal action here was 'whether the drug was misbranded within the meaning of 21 U. S. C. 352(a).'" *It is not true* that "the record affirmatively shows that the decision in the criminal case was based on a finding against the Government on the issue of misbranding, not on failure by the Government to prove its case beyond a reasonable doubt." *The Government does not admit* "that the underlying issue raised in the instant civil proceeding was actually litigated and determined in the criminal case," *nor has "the Government stipulated* that that issue was actually determined."

There is no basis whatsoever for the inferences Appellee derives from the Stipulation. We quote the pertinent part of the Stipulation [R. 22]:

> "Subsequent to the filing of the information in said Cause No. 7984, Walter W. Gramer entered a plea of not guilty and after a trial on the merits of the issue of whether the drug was misbranded within the meaning of 21 U. S. C. 352(a), the United States District Court of Minnesota, Fourth Division, adjudged Walter F. Gramer not guilty of the crime charged by the said information, pursuant to which the judgment of dismissal, a copy of which is annexed hereto as 'Exhibit B' was entered therein."

This Stipulation is not complex. It recites that there was a trial on the merits in the criminal case and that the defendant was held to be not guilty of the crime charged in the Information. The Stipulation waives no rights of the Government here and does not purport to probe the mental reactions of the Court in the criminal case. The judgment of that Court speaks for itself. [R. 26.] Whatever issues were resolved by that Court were presumably decided upon the Court's belief that the Government had failed to prove every material allegation of fact *beyond a reasonable doubt.*

It was never the Government's intention to enter into a Stipulation such as Appellee now conjures up, and no such Stipulation was in fact entered into. Furthermore, such a Stipulation would be inconsistent with the Government's entire position in this proceeding. For example, the Government's Motion to Strike the Affirmative Defense in the Answers [R. 19] says in part:

> "Said defense is insufficient since the judgment of dismissal in a criminal case, where the burden of proof is 'beyond a reasonable doubt,' can not be *res judicata* in the instant consolidated action where the burden of proof is 'by a preponderance of the evidence.' "

We submit that Appellee's argument with respect to the Stipulation is wholly frivolous.

IV.

Miscellaneous Points.

Appellee's brief [pages 13-14] cites the case of *George H. Lee Co. v. United States,* 41 F. 2d 460 (C. A. 9, 1930). There this Court decided that an adjudication in a *seizure* action under the Insecticide Act of 1910 is *res judicata* in a *subsequent seizure* action involving another shipment of the same product. This is a far cry from the present case where Appellee argues that an acquittal in a *criminal case* is *res judicata* in a subsequent *seizure case.*

Appellee's brief [pages 21-22] charges that the Government in its brief improperly referred to prior actions involving Mr. Gramer and his product, Sulgly-Minol. We believe it entirely proper that this Court should view the instant litigation in its complete setting, and not *in vacuo.* Especially is this true when the prior actions are reflected in official documents of which the Courts take judicial notice. [See Appellant's Br. p. 14, footnote 2.]

Appellee's brief [page 23] refers to the *first* criminal prosecution of Mr. Gramer which resulted in his conviction. The violation there involved was not inadvertent and, as reflected in Drugs and Devices Notice of Judgment 2281, it resulted in substantially the same charges of misbranding as are made in the present case. The assertion that the Food and Drug Administration has approved Mr. Gramer's labeling is untrue. We have investigated the statement that Mr. Gramer withdrew his plea of guilty in the above case and substituted a *nolo contendere* plea. We are advised by the Clerk of the United States District Court for the District of Minne-

sota that there is no record in the Court files of any such change of plea.

Appellee's brief [page 23] charges that the Government abused its discretion in making a number of seizures of Sulgly-Minol and that the sole purpose of such seizures was to insert reference to them in our brief in this appeal. While this charge is absurd on its face, we ask this Court to consider the facts as revealed by the Notices of Judgments discussed on pages 13-14 of our main brief:

> (1) On November 3, 1947, Mr. Gramer pleaded guilty in a criminal prosecution in the District of Minnesota involving Sulgly-Minol.
>
> (2) On August 9, 1948, a shipment of Sulgly-Minol was condemned and destroyed in the Western District of Wisconsin.

The charges in both of these proceedings related to false and misleading therapeutic claims substantially the same as involved in subsequent litigation. Under 21 U. S. C. 334(a)(1), there is no limitation to the number of seizure actions that may be brought "when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act." This is entirely different from the situation in *Ewing v. Mytinger & Casselberry, Inc.,* 339 U. S. 594 [referred to in Appellee's brief on page 22], where there had been no prior adjudication and where multiple seizures were predicated upon an administrative determination of "probable cause" under 21 U. S. C. 334(a)(2).

In the instant situation, where there had been a prior plea of guilty and a default decree of condemnation and

destruction, the Government would have been remiss if it had not acted to protect the public from further deception. Sulgly-Minol is offered as an effective remedy for arthritis, rheumatism, boils, and acne. [R. 27-32.] As this Court knows, persons who are unfortunately afflicted by such ailments are often victimized by vendors of nostrums.

Research Laboratories, Inc. v. United States, 167 F. 2d 410 (C. A. 9, 1948), cert. den. 335 U. S. 843;

Alberty Food Products Co. v. United States, 185 F. 2d 321 (C. A. 9, 1950);

Colgrove v. United States, 176 F. 2d 614 (C. A. 9, 1949), cert. den. 70 S. Ct. 349.

All of the seizure actions against Sulgly-Minol were instituted months before the lower court's decision in this case. The sole purpose of those actions was to protect the public, not "to build up the record" here. Furthermore, Appellee could easily have effected consolidation of the seizure actions pursuant to 21 U. S. C. 334(b).

Appellee's brief [page 7] cites *United States v. Gully,* 9 F. 2d 959 (S. D. N. Y.). It is quite true that the libel there involved was dismissed on authority of the *Coffey* case. We think it pertinent, however, to quote the remarks of Judge Learned Hand, then District Judge, in reluctantly dismissing the libel to forfeit a boat:

Page 960:

"It is clear to me that there was reasonable cause, and more than reasonable cause, for the libel in the first instance. Indeed, I may go further, and say that I never saw a clearer case of the violation of three of the sections here in question, though that has

unfortunately nothing to do with the disposition of the case. I need hardly say that it is quite out of place for me to express any opinion as to whether the case of Coffey v. United States was correctly decided or not. That, of course, is a question which only the Supreme Court can reconsider."

Judge Hand could not distinguish the *Gully* case from the *Coffey* case. However, the instant case is readily distinguishable as we have demonstrated, and should be distinguished in the public interest.

Respectfully submitted,

J. Charles Dennis,
United States Attorney,

Vaughn E. Evans,
Assistant United States Attorney,

Attorneys for Appellant.

Arthur A. Dickerman,
Attorney, U. S. Food and Drug Administration, Federal Security Agency,

Of Counsel.